88-1647

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY L. McKINNON,

Petitioner,

v.

CITY OF BERWYN, a municipal corporation, JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLANTI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in dismissing petitioner's appeal for lack of jurisdiction on the grounds that a motion for prejudgment interest on an attorney's fees award, which was entered as part of a final order, did not suspend the time for appeal on the entire judgment.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINION BELOW	2
JURISDICTION	2
RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
THIS PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT HAS INCORRECTLY INTERPRETED THIS COURT'S HOLDING IN *WHITE v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY* and *BUDINICH v. BECTON DICKINSON CO.*, TO HOLD THAT A MOTION TO ALTER OR AMEND AN ATTORNEY'S FEE AWARD ENTERED AS PART OF A FINAL JUDGMENT DOES NOT QUALIFY AS A RULE 59(e) MOTION FOR THE PURPOSE OF TOLLING THE 30 DAY APPEAL PERIOD	4
CONCLUSION	9

APPENDIX

A— Order of the United States Court of Appeals dismissing Appeal, October 24, 1988	A-1
B— Order of the United States Court of Appeals denying Petition for Rehearing, January 13, 1989	B-1
C— Order of the United States Court of Appeals ordering parties to address the issues	C-1

TABLE OF AUTHORITIES

Cases PAGE

Bricklayer's Pension Trust Fund v. Taiariol, 671 F.2d 988 (6th Cir. 1982) 6, 9

Budinich v. Becton Dickinson Co., 486 U.S. ____, 108 S.Ct. 1717 (1988) ..... *passim*

Charles v. Daley, 799 F.2d 343 (7th Cir. 1986) ... 8

Chicago & Northwestern Railway Co. v. Union Packing Co., 527 F.2d 592 (8th Cir. 1976) ... 6, 9

F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 739 F.2d 284 (7th Cir. 1984) 7, 8, 9

Goodman v. Heublein, Inc., 682 F.2d 44 (2nd Cir. 1982) 6, 9

Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521 (11th Cir. 1987) 6, 9

Scola v. Boat Francis, R., Inc., 618 F.2d 147 (1st Cir. 1980) 6, 8, 9

Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983) . 6, 8

White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) ..... *passim*

Wort v. Verling, 778 F.2d 1233 (7th Cir. 1985) ... 8

Statutes

28 U.S.C. § 1254 2

Miscellaneous

Federal Rules of Civil Procedure, Rule 59(e) ..... *passim*

In The

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October Term, 1988

LARRY L. McKINNON,

Petitioner,

v.

CITY OF BERWYN, a municipal corporation, JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLANTI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner Larry L. McKinnon respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals ("Op."), dismissing the appeal for lack of jurisdiction was entered as an unpublished order, Nos. 88-1516 and 88-1589 and is attached as Appendix A.

JURISDICTION

On October 24, 1988, the United States Court of Appeals for the Seventh Circuit dismissed petitioner's appeal for lack of jurisdiction. On November 2, 1988, the petitioner filed a timely petition for rehearing. The rehearing petition was denied on January 13, 1989. *See* Appendix B. This petition is filed within 90 days of the order denying the petition for rehearing and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

RULE INVOLVED

Rule 59(e), Federal Rules of Civil Procedure, provides as follows:

> Rule 59. New Trials; Amendment of Judgments
>
> . . .
>
> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

1. District Court Proceedings

On August 28, 1985, pursuant to the entry of a jury verdict on retrial, a Rule 58 judgment was entered on the district court's civil docket. Approximately two years later, on July 30, 1987, the District Court entered an order disposing of certain pending post-trial motions. This final Rule 58 judgment included an award of attorney's fees to petitioner in the amount of $12,825. The Rule 58 judgment, including the judgment for attorney's fees, was docketed on August 4, 1987. On August 11, 1987, the petitioner filed a motion for prejudgment interest on the $12,825 attorney's fee judgment. On March 3, 1988, the District Court granted petitioner's motion for prejudgment interest on the attorney's fee award. On March 17, 1988, petitioner's Notice of Appeal was filed with the Seventh Circuit Court of Appeals.

2. Seventh Circuit Proceedings

On May 19, 1988, the Seventh Circuit, *sua sponte*, raised the issue of the timeliness of petitioner's Notice of Appeal and ordered the parties to file memoranda addressing the jurisdictional issue. *See* Appendix C.

On October 24, 1988, the Seventh Circuit entered an order dismissing petitioner's appeal for lack of jurisdiction. The court found that all post-trial motions were disposed of by way of an order docketed in the district court on August 4, 1987. The Seventh Circuit also found that the district court, in its order of August 4, 1987, had granted petitioner's request for attorney's fees and entered judgment thereon. (Op. at 2.) The court further

found that on August 11, 1987, the petitioner filed three motions relating to the award of attorney's fees. (Op. at 2.) However, the Seventh Circuit held that the decision on the merits became final on August 4, 1987, and that the time to appeal started to run from that date, and not the date judgment was entered on the motions dealing with attorney's fees. (Op. at 2.) In essence, the Seventh Circuit held that an unresolved issue of attorney's fees for the litigation in question did not prevent the judgment on the merits from being final. Therefore, under the Seventh Circuit's analysis, the petitioner's appeal was untimely and was properly dismissed.

REASONS FOR GRANTING THE PETITION

THIS PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT HAS INCORRECTLY INTERPRETED THIS COURT'S HOLDING IN *WHITE v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY* AND *BUDINICH v. BECTON DICKINSON CO.*, TO HOLD THAT A MOTION TO ALTER OR AMEND AN ATTORNEY'S FEE AWARD ENTERED AS PART OF A FINAL JUDGMENT DOES NOT QUALIFY AS A RULE 59(e) MOTION FOR THE PURPOSE OF TOLLING THE 30 DAY APPEAL PERIOD.

This case presents the issue of whether a motion for prejudgment interest on an award of attorney's fees entered as part of the final order of a case constitutes nothing more than a request for attorney's fees or, whether it constitutes a motion to alter or amend under Rule 59(e), F.R.Civ.P., and would, therefore, toll the 30 day appeal period.

In dismissing petitioner's appeal, the Seventh Circuit relied principally on two decisions of this Court. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), and *Budinich v. Becton Dickinson Co.*, 486 U.S. ____, 108 S.Ct. 1717 (1988). Factually, both cases dealt with situations where, after entry of judgment, the prevailing party had made a request for attorney's fees. *White* and *Budinich* both held that a petition for attorney's fees was an independent proceeding which was supplemental to the original proceeding and did not constitute a request for modification of the original decree. Such a petition for attorney's fees, therefore, could not qualify as a motion to alter or amend under Rule 59(e) for the purpose of tolling the 30 day appeal period. The holding in both *White* and *Budinich* appears to be predicated on the understanding that "a motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not *imply a change in the judgment*, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)." *White v. New Hampshire Dept. of Employ. Sec.*, 455 U.S. at 452 (emphasis added).

In the instant case, however, the Seventh Circuit has taken the holding set forth in *White* and *Budinich* and applied it to the inapposite factual situation presented here. Specifically, in the case at bar, when the final order was docketed on August 4, 1987, it included a final judgment for attorney's fees in the amount of $12,825. This judgment was entered on the same document which disposed of all post-trial motions addressing the merits of the case. On August 11, 1987, the plaintiff filed three motions, including a motion to alter or amend the judgment for attorney's fees to include prejudgment interest. It is this single fact that distinguishes the instant case from *White* and

Budinich because here plaintiff was seeking "*a change in the judgment*" and not "merely . . . what is due because of the judgment." *White v. New Hampshire Dept. of Employ. Sec.*, 455 U.S. at 452 (emphasis added). The change being the augmentation of part of the judgment with prejudgment interest. The issue of prejudgment interest would "alter the final order or moot or revise decisions embodied in the order" and thus "prevent finality of its resolution." *Budinich v. Becton Dickinson Co.*, 486 U.S. at ____, 108 S.Ct. at 1720. The attorney's fee award here was "embodied" in the final order which the plaintiff was seeking to "alter."

Petitioner submits there can be little question that the judgment for attorney's fees was "embodied" in the final order and that the real issue is whether the motion for prejudgment interest constituted a Rule 59(e) motion to alter the final order. Existing case law firmly supports petitioner's position that his motion for prejudgment interest on the award of attorney's fees constituted a motion to alter or amend under Rule 59(e). Every circuit that has had the opportunity to address the issue has concluded that a motion for discretionary (as was the situation presented here) prejudgment interest *must* be filed pursuant to Rule 59(e). *Scola v. Boat Francis, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2nd Cir. 1982); *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983); *Bricklayer's Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982); *Chicago & Northwestern Railway Co. v. Union Packing Co.*, 527 F.2d 592 (8th Cir. 1976); *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1525 (11th Cir. 1987).

Although this Court appears not to have addressed this issue, the overwhelming weight of authority indicates that an award of prejudgment interest pursuant to a post-trial

motion requires an amendment of judgment under Rule 59(e). If that is the case, then plaintiff, in order to obtain prejudgment interest, had no alternative but to file a Rule 59(e) motion to alter or amend the judgment.

The question presented in the instant case, therefore, is whether petitioner's filing of an appropriate Rule 59(e) motion as to the attorney's fee award portion of the August 4th judgment, suspended the finality of the entire judgment. In its order of October 24th, dismissing the appeal, the Seventh Circuit acknowledged that the attorney's fee award was part of the final order entered on August 4, 1987. (Op. at 2.) But, implicit in the Seventh Circuit's opinion is the holding that plaintiff's Rule 59(e) motion to amend part of the judgment suspended the time for appeal only as to the prejudgment interest issue. This reasoning is in conflict with the decisions of the other circuits cited above, with common sense, and indeed with the Seventh Circuit's own holding in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 739 F.2d 284 (7th Cir. 1984). There, the Seventh Circuit held that a motion under Rule 59(e) to reconsider or amend part of a judgment suspends the time for appeal as to all issues and all parties. The Seventh Circuit's finding in the instant case therefore is inconsistent with its prior decision that a motion to alter any part of a final judgment suspends the finality of the entire judgment.

The Seventh Circuit's reasoning in this case fails to distinguish the difference between a petition for attorney's fees, which is purely collateral to the entry of final judgment, and a motion for prejudgment interest on an attorney's fee award entered as part of the final order, which is an attack on the final judgment itself. The failure to make this important dinstinction leads to an extension of the rule of law of *White* and *Budinich* not contemplated

by this Court. If the Seventh Circuit's ruling is allowed to stand, a litigant receiving an attorney's fee award, as part of a final judgment and wishing to seek modification or amendment of such a judgment, would be placed in an untenable predicament. Specifically, if he failed to file a Rule 59(e) motion within ten days of entry of judgment, case law clearly indicates he would forfeit his right to seek amendment. If, on the other hand, a motion to amend or alter the part of the judgment awarding attorney's fees is filed within ten days, the litigant is left in doubt as to whether he should file a notice of appeal, notwithstanding the fact that his motion to amend is still pending. A common sense application of the Federal Rules of Civil Procedure and the unmistakable language of the Seventh Circuit in *F.E.L. Publications, supra*, would dictate that a notice of appeal not be filed until after the motion to amend is ruled upon.

The above analysis demonstrates why the holdings in *White* and *Budinich*, are applicable only to pending motions for attorney's fees. Once an award for attorney's fees has been entered as an integral part of a final judgment the whole analysis must change because of the applicability of Rule 59(e). Such an analysis in this case would include the following facts:

(1) The final Rule 58 judgment docketed on August 4, 1987, included a judgment for attorney's fees in a specified sum;

(2) The award of attorney's fees was just as final and just as appealable as any other part of the judgment. *See, Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986) and *Wort v. Verling*, 778 F.2d 1233 (7th Cir. 1985);

(3) It was compulsory that any motion for prejudgment interest on the award of attorney's fees be filed under Rule 59(e). *Stern v. Shouldice, supra, Scola v.*

Boat Francis R., Inc., supra, Bricklayer's Pension Trust Fund v. Taiariol, supra, Goodman v. Heublein, Inc., supra, Osterneck v. E.T. Barwick Industries, Inc., supra, Chicago and Northwestern Railway Co. v. Union Packing Co., supra;

(4) A Rule 59(e) motion to alter or amend any part of a judgment suspends the time for appeal as to all issues. *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, supra*; and

(5) The Rule 59(e) motion filed by plaintiff on August 11, 1987, as to the portion of the judgment dealing with attorney's fees, suspended the finality of the judgment and precluded appeal of any issue.

Based on the foregoing, it is apparent that the Seventh Circuit's decision in this case constitutes an unwarranted extension of this Court's holdings in *White* and *Budinich*. Left untouched, the Seventh Circuit's holding is bound to create confusion in an area that this Court has taken pains to clearly define.

CONCLUSION

WHEREFORE, Petitioner Larry L. McKinnon respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 24, 1988.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

LARRY L. MCKINNON,

Plaintiff-Appellant,
Cross-Appellee,

Nos. 88-1516 and 88-1589

vs.

CITY OF BERWYN, a municipal corporation,

Defendant-Appellee,
Cross-Appellant,

and

JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLTANI,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82-C-2046—Hon. **Ann C. Williams**, *Judge.*

ORDER

On consideration of the "PLAINTIFF-APPELLANT'S MEMORANDUM ON JURISDICTION" and the "MEMORANDUM OF DEFENDANT-APPELLEE, CROSS-APPELLANT REGARDING JURISDICTION,"

IT IS ORDERED that both appeal Nos. 88-1516 and 88-1589 are DISMISSED for lack of jurisdiction.

As to 88-1589, defendant-appellee, cross-appellant admits that its appeal is premature because no judgment has been entered on its petition for attorney's fees.

In 88-1516, the Rule 58 merits judgment was entered on the district court's civil docket on August 25, 1985. Timely post-trial motions were filed; all post-trial motions addressed to the merits of the action were denied in an order dated July 20, 1987 and entered on the district court's civil docket on August 4, 1987. In the same order, the district court granted plaintiff's request for attorney's fees, and judgment awarding attorney's fees was entered on a separate document also on August 4, 1987. On August 11, 1987, the plaintiff filed 3 motions, all relating solely to the award of attorney's fees. The decision on the merits became final on August 4, 1987 when the district court resolved all post-trial motions as to the merits of the case, and the time to appeal started to run. Plaintiff's notice of appeal from the merits judgment filed on March 17, 1988 was more than 6 months late. *See* Fed. R. App. P. 4(a)(4). An unresolved issue of attorney's fees for the litigation in question does not prevent the judgment on the merits from being final. *Budinich v. Becton Dickinson Co.*, 108 S.Ct. 1717, 1721-22 (1988). See also *Exchange National Bank v. Daniels*, 736 F.2d 286 (7th Cir. 1985) (a notice of appeal from an order awarding or denying fees does not "bring up" the judgment on the merits for appellate review).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 13, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

Nos. 88-1516 and 88-1589

LARRY L. MCKINNON,

Plaintiff-Appellant,
Cross-Appellee,

VS.

CITY OF BERWYN, a municipal corporation,

Defendant-Appellee,
Cross-Appellant,

and

JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLTANI,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82-C-2046—**Ann C. Williams**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellant, cross-appellee, Larry L. McKinnon on November 2, 1988, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 19, 1988.

By the Court:

LARRY L. MCKINNON,

Plaintiff-Appellant,
Cross-Appellee,

Nos. 88-1516 and 88-1589 vs.

CITY OF BERWYN, a municipal corporation, et al.,

Defendant-Appellee,
Cross-Appellant,

and

JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLTANI,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82-C-2046—**Ann C. Williams,** *Judge.*

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

A preliminary review of the short record indicates that the orders appealed from may not be appealable.

Where a district court has entered a final judgment on the merits of a case, the entry of a subsequent order granting or denying an award of attorneys' fees pursuant to statute is a separate proceeding having no effect on the finality of the merits judgment. See *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982); *Exchange National Bank v. Daniels*, 763 F.2d 286, 289-94 (7th Cir. 1985). As to appeal No. 88-1516, the Rule 58 merits judgment was entered on the district court's civil docket on August 25, 1985. The defendants filed timely post-trial motions which were denied in a minute order dated July 30, 1987 and entered on the district court's civil docket on August 4, 1987. Plaintiff's notice of appeal was filed more than seven months later. Therefore, it appears that plaintiff McKinnon's appeal of the merits judgment is untimely. See Fed. R. App. P. 4(a)(4); *Exchange National Bank v. Daniels, supra* (a notice of appeal from an order awarding or denying fees does not "bring up" the judgment on the merits for appellate review).

In the cross-appeal, docketed as No. 88-1589, defendant City of Berwyn states that it appeals the denial of its petition for attorneys' fees. However, it not only appears that the district court entered no Rule 58 judgment on the petition, but it appears that the district court made no ruling at all on the petition, making this appeal premature. Accordingly,

IT IS ORDERED that all parties shall file, on or before June 1, 1988, brief memoranda addressing both jurisdictional issues raised herein and stating why these appeals should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.

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CITY OF BERWYN, a municipal corporation, JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLANTI,

Respondents.

BRIEF OF RESPONDENT CITY OF BERWYN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ADDITIONAL STATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	10

TABLE OF AUTHORITIES

	PAGE
Bank of California v. Arthur Andersen & Co., 709 F.2d 1174 (7th Cir. 1983)	10
Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502 (1962)	8
Buchanan v. Stanships, Inc., ___ U.S. ___, 108 S.Ct. 1130 (1988)	9
Budinich v. Becton Dickinson & Co., 486 U.S. ___, 108 S.Ct. 1717 (1988)	5
Department of Banking v. Pink, 317 U.S. 264, 63 S.Ct. 233 (1942)	8
Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 73 S.Ct. 245 (1952)	8
F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, 739 F.2d 284 (7th Cir. 1984)	9
Missouri v. Jenkins, 57 U.S.L.W. 4735 (1989)	7
Osterneck v. Ernst & Whinney, ___ U.S. ___, 57 U.S.L.W. 4212 (1989)	7
Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777 (1939)	6
Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975)	9
Terket v. Lund, 623 F.2d 29 (7th Cir. 1980)	9
White v. New Hampshire Department of Employment Security, 455 U.S. 445, 102 S.Ct. 1162 (1982)	4, 5

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BRIEF OF RESPONDENT CITY OF BERWYN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ADDITIONAL STATEMENT OF THE CASE

Procedural Facts

After an appeal, the Petitioner's claims under 42 U.S.C. § 1983 against Respondents City of Berwyn and Police Officer Roger Montoro, were re-tried on the issue of dam-

ages in August, 1985. On retrial, the jury returned a verdict of compensatory damages against both Respondents and a verdict of punitive damages against Officer Montoro. A Rule 58 judgment was entered on the court's civil docket on August 28, 1985.

Thereafter, the Respondents filed timely post-trial motions under Rule 59(e) which stayed the time during which an appeal could be taken from the judgment on the merits until a ruling on the Respondents' post-trial motions. While the post-trial motions were pending, Petitioner's counsel filed his petition for attorney's fees under 42 U.S.C. § 1988 in the district court on October 16, 1985.

On July 30, 1987, the district court issued an order and memorandum opinion disposing of all pending motions. In a single order, the court denied the Respondents' post-trial motions; awarded Petitioner attorney's fees under 42 U.S.C. § 1988; and denied a motion previously filed by Petitioner requesting that the punitive damage award entered against the officer be enforced against the City. Accordingly, a Rule 58 judgment was docketed on August 4, 1987.

On August 11, 1987, the Plaintiff-Petitioner filed three motions, each of which related solely to the issue of Section 1988 attorney's fees. Those motions included a petition for additional attorney's fees; a petition to enforce the attorney's fee award against the City of Berwyn; and, a petition for prejudgment interest on the attorney's fees which had been awarded on July 30, 1987. None of the three motions filed by the Petitioner was styled as a Rule 59(e) motion nor as a motion to alter or amend the judgment order of August 4, 1987. The Petitioner filed no motion related to the judgment on the merits.

On March 3, 1988, the district court entered an order awarding the Petitioner additional attorney's fees and awarding the Petitioner interest on the Section 1988 attorney's fee award.

On March 17, 1988, the Petitioner filed his notice of appeal in the district court. The notice of appeal did not seek review of any issues related to Section 1988 attorney's fees or the district court order of March 3, 1988. Rather, the notice of appeal sought review of an order of the trial court entered prior to the retrial pursuant to the mandate of the Seventh Circuit; of a portion of the order of July 30, 1987 memorializing Petitioner's non-acceptance of a remittitur and his request for a new trial; and that portion of the same order refusing his request to enforce the punitive award against the City.

ARGUMENT

The Petitioner has incorrectly stated the issue upon which review is being sought as follows:

> The question presented in the instant case, therefore, is whether the Petitioner's filing of an appropriate Rule 59(e) motion as to the attorney's fee award portion of the August 4 judgment, suspended the finality of the entire judgment. (Petitioner's brief, p. 7).

The issue as stated by the Petitioner somewhat misses the mark, for that statement of the issue assumes that Petitioner's motion for prejudgment interest on an award of Section 1988 attorney's fees constituted a Rule 59(e) motion to alter or amend the judgment. The issue is simply whether, under the facts and circumstances of this case,

the Petitioner's motion for prejudgment interest on his Section 1988 fee award filed August 11, 1987, suspended the finality of the judgment on the merits which was entered on July 30, 1987, and docketed on August 4, 1987. In short, does a motion directed to an order on a collateral matter (the award of fees) stay the judgment on the merits, for it is a review of the merits that was being sought in the Court of Appeals.

The Petitioner's petition is premised upon the erroneous characterization of his motion for prejudgment interest on his Section 1988 fee award as a Rule 59(e) motion to alter or amend a final judgment.

To the contrary, the Petitioner's motion for prejudgment interest on his award of attorney's fees was not a Rule 59(e) motion which brought into play the operation of Federal Rule of Appellate Procedure 4(a)(4), and, therefore, the time to appeal from the judgment on the merits (which became final and appealable on August 4, 1987) was not stayed. It is the Respondent's contention that since a fee petition is a collateral matter, any motion relating to an order on a collateral matter does not stay the underlying judgment of the merits.

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162 (1982), this Court held that a motion for attorney's fees under 42 U.S.C. § 1988 is not a motion under Rule 59(e), the latter being a motion which addresses only matters properly encompassed in a decision on the merits. A request for attorney's fees under 42 U.S.C. § 1988 "raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *Id.*, 455 U.S. at 451. Because a motion for attorney's fees requires an inquiry separate from the decision on the merits, an attorney fee

award is "uniquely separable" from the underlying cause of action. *Id.*, 455 U.S. at 452.

That a question may remain concerning the recoverability or the amount of attorney's fees under 42 U.S.C. § 1988 will not prevent a judgment on the merits from being final. *Budinich v. Becton Dickinson & Co.*, 486 U.S. ____, 108 S.Ct. 1717, 1721-22 (1988). In *Budinich*, this Court unanimously stated:

> We are not inclined to adopt a position that requires the merits or non-merits status of each attorney fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of Section 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case. (108 S.Ct. at 1722).

In this case, the Petitioner attempts to distinguish *White* and *Budinich* on the basis that "the attorney's fee award here was 'embodied' in the final order which the plaintiff was seeking to 'alter' ". (Petitioner's brief, p. 6). The thrust of the Petitioner's argument is that because the final judgment on the merits also contained an ancillary award of Section 1988 attorney's fees and because his motion for prejudgment interest on his attorney's fee award was filed within ten days of the final judgment on the merits, that motion acted as a Rule 59(e) motion which stayed the time for appeal. The distinction suggested by the Petitioner is meaningless and grossly deviates from this Court's holdings in *White* and *Budinich*.

If, in fact, issues related to an attorney's fee award are truly collateral to the decision on the merits, then it is wholly immaterial when attorney's fees are awarded—it

is of no significance whether they are awarded at the same time as the judgment on the merits or whether they are awarded subsequent to the judgment on the merits. There exists no juridical basis for arguing that the issue may be transformed into a non-collateral issue depending upon when a ruling is made or depending upon the form of the ruling. Form should not be exaulted over substance.

The Petitioner's motion for prejudgment interest on the attorney's fees awarded was not denominated as a Rule 59(e) motion nor was it styled as a motion to alter or amend the judgment. The motion did not request the trial court to alter or amend the judgment on the merits in any way. In fact, the motion for prejudgment interest on the attorney's fees awarded did not seek to alter or amend the substance of the already awarded fees.

The motion in question was merely a supplemental request for taxation of additional costs. Because almost two years had elapsed between the submission of his fee petition and the order awarding fees in August, 1987, the Petitioner requested that interest be awarded on the fees.

The recovery of those additional costs to be taxed against the non-prevailing parties are provided for in neither the language nor the history of 42 U.S.C. § 1988. The Plaintiff's request for prejudgment interest on the attorney's fees awarded was simply a request for taxation of additional costs which was addressed to the inherent, equitable powers of the court. *See, e.g., Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939). The requested taxation of additional costs amounted to an independent, supplemental proceeding, and, the district court, in the exercise of its federal common law powers, could have entertained such a motion at any time. The court was not bound by any ten-day limitation in

ordering additional taxation of costs. Alternatively, the motion was simply a request for a fee enhancement necessitated by the unexpected delay in the ruling. *Missouri v. Jenkins*, ____ U.S. ____, 57 U.S.L.W. 4735 (1989).

Petitioner has cited to the court several decisions from various Circuit Courts of Appeal which have held that a motion for prejudgment interest must be brought under Rule 59(e). (Petition at p. 6). Each of those cases is inapposite to the issue now before the Court, inasmuch as each of those decisions dealt with requests for prejudgment interest on money damages awarded in the judgment on the merits.

In *Osterneck v. Ernst & Whinney*, ____ U.S. ____, 57 U.S.L.W. 4212 (1989), this Court held that a post-judgment motion for discretionary prejudgment interest on a final judgment on the merits is a Rule 59(e) motion which would render ineffective any notice of appeal filed during the pendency of the motion. In *Osterneck*, this Court limited its holding to post-trial motions for prejudgment interest on the underlying judgment resulting from a decision on the merits of the case, as such a motion involves reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply. This Court carefully distinguished the issue then before the court from a request for attorney's fees under Section 1988 which raises legal issues wholly collateral to, and separable from, a decision on the merits.

It is illogical to say that a motion for Section 1988 attorney's fees, which is collateral to the merits judgment, does not constitute a Rule 59(e) motion, but that a request for interest on that award does amount to a Rule 59(e) motion.

The conclusion of the Seventh Circuit that the decision on the merits became final and appealable on August 4, 1987, is consistent with the "practical", "pragmatic" approach to the issue of finality which is favored by this Court. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S.Ct. 245, 249 (1952); *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 1513 (1962). Application of a pragmatic approach requires that, in order for a motion to suspend appealability from a final judgment, the post-judgment motion must seek an "alteration of the rights adjudicated" in the court's judgment. *Department of Banking v. Pink*, 317 U.S. 264, 63 S.Ct. 233, 234 (1942). Relative to the practical test for determining finality, this Court stated, in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., supra*, as follows:

> [W]hile we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this court to take heed of another principal—the principal that litigation must at some definite point be brought to an end. It is a principal reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review. (73 S.Ct. at 249, 250).

Because the Petitioner's motion for prejudgment interest on his award of attorney's fees did not seek to alter or amend the substance of the final judgment in any way, that motion cannot be considered as a Rule 59(e) motion. Just as importantly, the motion for prejudgment interest on the award of attorney's fees was of no import to the

matters for review, as asserted in the Petitioner's notice of appeal.

In the petition, the Plaintiff states that a "common sense" application of the Federal Rules of Civil Procedure and the language of the Seventh Circuit in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 739 F.2d 284 (7th Cir. 1984), would dictate that a notice of appeal not be filed until a ruling upon the "motion to amend." (Petitioner's brief, p. 8). That statement totally ignores the preferred practice which has been sanctioned by, and mandated by, the Seventh Circuit Court of Appeals for many years. Had the Plaintiff timely filed his notice of appeal, the district court would have retained jurisdiction to entertain any motion related to attorney's fees or costs. *Cf. Buchanan v. Stanships, Inc.*, 108 S.Ct. 1130 (1988).

The rule in the Seventh Circuit has been that, because an award of attorney's fees is a decision "distinct from the decision on the merits", the district court's reservation of issues relating to attorney's fees will not impede the finality of the judgment on the merits. *Terket v. Lund*, 623 F.2d 29, 33-34 (7th Cir. 1980); *Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555 (7th Cir. 1975). Therefore, the filing of a notice of appeal does not divest the district court of jurisdiction to consider such ancillary matters as awarding costs or attorney's fees under 42 U.S.C. § 1988. In *Terket*, the Seventh Circuit Court of Appeals gave the following notice to attorneys who practice in this circuit:

> [D]istrict courts in this circuit should proceed with attorney's fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits. (623 F.2d at 34).

Although the Petitioner has belatedly characterized his motion for prejudgment interest on the attorney's fees awarded as a motion to alter or amend the judgment, it is the substance of the motion which controls in determining whether a post-judgment motion constitutes a motion brought under Rule 59(e). *Bank of California v. Arthur Andersen & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983).

CONCLUSION

Because the Petitioner's post-judgment motion amounted to nothing more than a collateral claim for taxation of additional costs, the time for appeal from the final judgment on the merits was not tolled. As a result, the decision of the Seventh Circuit Court of Appeals entered on October 24, 1988 was correct. Therefore, it is requested that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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